Exhibit 12

To Be Argued By:
Y. DAVID SCHARF

New York County Clerk's Index No. 850044/2011

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ORCHARD HOTEL, LLC,

Plaintiff-Appellant,

—against—

D.A.B. GROUP, LLC,

Defendant-Respondent,

—and—

BROOKLYN FEDERAL SAVINGS BANK and STATE BANK OF TEXAS

Defendants-Appellants,

—and—

(*caption continued on inside cover*)

BRIEF FOR PLAINTIFF-APPELLANT

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ORCHARD CONSTRUCTION, LLC; FLINTLOCK CONSTRUCTION SERVICES LLC; JJ K MECHANICAL INC.; EDWARD MILLS & ASSOCIATES, ARCHITECTS PC; CASINO DEVELOPMENT GROUP, INC.; CITYWIDE CONSTRUCTION WORKS INC.; EMPIRE TRANSIT MIX INC.; MARJAM SUPPLY CO., INC.; ROTAVELE ELEVATOR INC.; SMK ASSOCIATES INC.; FJF ELECTRICAL CO. INC.; CITY OF NEW YORK; NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE; LEONARD B. JOHNSON; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, JOHN DOE #1 through JOHN DOE #100, the last 100 names being fictitious, their true identities unknown to plaintiffs, and intended to be the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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MISCELLANEOUS

Plaintiff-Appellant Orchard Hotel, LLC ("Mortgagee" or "Orchard") respectfully submits this memorandum in support of its appeal of the Order of the IAS Court (Ramos, J.) entered August 28, 2013 (i) granting the motion of Defendant-Respondent D.A.B. Group LLC ("DAB") to renew Mortgagee's motion to dismiss DAB's counterclaims and vacating the March 28, 2012 Decision and Order of the IAS Court (Fried, J.), which had been affirmed by the Appellate Division, First Department, on May 28, 2013 (106 A.D.3d 628), (ii) directing DAB, *sua sponte*, to file an amended answer and counterclaims, and (iii) granting the cross-motion of Flintlock Construction Services LLC ("Flintlock") to amend its answer and counterclaims but otherwise withholding consideration of Mortgagee's motion for summary judgment and other relief, which has been pending since April 2, 2012.

PRELIMINARY STATEMENT

On May 28, 2013, this Court correctly affirmed an order of the IAS Court (Fried, J.) which dismissed all counterclaims brought by borrower DAB, clearing the way to foreclosure of two commercial mortgages (the "Mortgages"). Since Justice Fried's retirement, this case has veered wildly off-course to the prejudice of all of the lien-holders who are likely to recover nothing if this dispute continues on its present path.

In a ruling from the bench on July 9, 2013, Justice Charles Ramos, to whom the action was re-assigned following Justice Fried's retirement, vacated Justice Fried's affirmed dismissal and directed DAB to file a new responsive pleading without evaluating whether a proposed pleading had merit, effectively returning this two-year-old foreclosure action to "square one." Justice Ramos also intentionally avoided ruling on Mortgagee's summary judgment motion (Motion No. 6), which has been pending since April 2, 2012, stating it was "moot," even though the Court granted Flintlock's cross-motion to amend, which was part of the same motion sequence. These rulings are in the Court's August 28, 2013 order (the "August 28 Order"), which was drafted by DAB and signed without modification or correction.

In the last 16 months, Mortgagee's summary judgment motion was argued four times and was repeatedly cast aside by Justice Ramos to permit unnecessary discovery and motion practice.[1] None of this activity has raised a triable issue of fact concerning the two elements of Mortgagee's foreclosure claims: the

[1] DAB's principal and its counsel attempted similar gamesmanship and delay in a related foreclosure action pending before Justice Sherwood, Signature Bank v. 77-79 Rivington St. Realty, No. 850001-2012. However, in contrast to this action, Justice Sherwood exhibited little tolerance, granting summary judgment against DAB's affiliate on June 20, 2013 with little or no discovery, even though that action was filed six months *after* this action. At the parties' first appearance in this action before Justice Ramos on July 31, 2012, Justice Ramos articulated his misperception that Mortgagee is a "vulture" and that he dislikes "vultures." It is hard to imagine that the Court-sanctioned delays since Justice Fried's retirement, and the vacatur of Justice Fried's affirmed dismissal order, are unrelated to the IAS Court's preconceived notion. Remand of this action to Justice Sherwood may be appropriate.

Mortgages are valid and DAB is in default. Mortgagee respectfully requests that this Court reverse the IAS Court and define a path so that Mortgagee's summary judgment motion can be granted and the Mortgaged Property auctioned. Clear guidance from this Court is imperative because the Mortgaged Property is an inactive construction site that can permanently lose its zoning entitlements if it remains mired in litigation. Loss of those entitlements would require demolition of eight stories of the 16-story superstructure, destroying the collateral of DAB's creditors.

Justice Fried's March 28, 2012 Decision and Order dismissed, *inter alia*, DAB's first counterclaim, which alleged that the original lender, Brooklyn Federal Savings Bank ("Brooklyn Federal"), before assigning the Mortgage loans (the "Loans") to Mortgagee, fraudulently misrepresented to DAB that the March 1, 2011 maturity date of the Loans had been extended. In dismissing DAB's fraud counterclaim, Justice Fried held that DAB could not have reasonably relied on "unsigned, unwritten representations" because the Loan Documents required that contractual modifications be effected only by written agreement. This Court unanimously affirmed Justice Fried's dismissal on the same grounds on May 28, 2013, three weeks after the appellate oral argument. That appeal was, and remains, correctly decided.

Prior to this Court's May 28 order, Justice Ramos twice heard oral argument on Mortgagee's summary judgment motion. Each time, the IAS Court delayed consideration of the motion so that DAB could pursue discovery that was either requested for the first time at oral argument or imposed by the IAS Court because the Court was "offended" that "there was a motion under 3211 before there was discovery." (R. 1208.33). [2] Through that discovery, DAB obtained an internal Brooklyn Federal "Commercial Loan Action Plan" dated February 15, 2011 (the "Action Plan"), in which members of the bank's Loan Workout Department recommended to the bank's Loan Workout Committee (the "Workout Committee") that the maturity date of the Loans be extended, subject to conditions precedent. The Action Plan expressly stated that any extension of the Loans would require prior approval from Brooklyn Federal's primary regulator, the federal Office of Thrift Supervision (OTS), which had placed the bank under scrutiny. The Action Plan is an internal bank document that was never communicated or delivered to DAB and was shortly thereafter revoked by Brooklyn Federal. DAB admits that it was never told of the Action Plan or its terms, which materially differed from the terms of the alleged misrepresentations pled in DAB's fraud counterclaim. DAB has consistently admitted that OTS had to approve any extension of the Loans,

[2] "R. __" refers to pages of the Joint Record on Appeal.

which approval was undisputedly never granted. In other words, the internal Action Plan changes nothing about Justice Fried's order or this Court's affirmance.

The Action Plan was revoked by Brooklyn Federal because the bank caught DAB's principal, Ben Zhavian ("Zhavian"), improperly withholding Building Loan proceeds instead of paying contractors. This serious misconduct violated the Loan Documents and confirmed the doubts of Brooklyn Federal about Zhavian's integrity. Brooklyn Federal promptly withdrew the Action Plan and requested OTS approval to sell the Loans to Mortgagee, which approval was granted. When asked at a deposition why Brooklyn Federal decided to sell the Loans, loan officer Bruce Gordon was direct: "we didn't trust Mr. Zhavian." (R. 963).

There is no question that DAB knew that the March 1, 2011 maturity date of the Loans was never extended. On May 24, 2011, nearly three months after the Loans had matured, DAB's counsel, William Wallace ("Wallace"), acknowledged in writing to Brooklyn Federal's counsel that the maturity date of the Loans had not been extended: "I understand that the Loan termed out pursuant to the original Loan documents on March 1, 2011 and that our respective clients have been discussing an extension of that term." (R. 796). Knowing that the parties never agreed on an extension of the Loans, DAB initially pled its counterclaim under a fraud theory, not a contract theory. Wallace admitted as much in court before

Justice Ramos: "No w, the loan on the fa ce of it [term ed] out on March 2011, no question." (R. 832).

At a later hearing, Wallace conced ed again that there was no written extension agreement: "when we got serv ed with the co mplaint and prepared an answer and counterclaim , the first thi ng you do i s ask the client: 'I read thes e documents. Is t here a writing extending this agreement?' He says, 'they *told* me, they kept *telling* me back to August of 2010 don't wo rry. Your loan is extended.'" (R. 1208.26-1208.27) (em phasis added). As Justice Fried and this Court correctly held, the Loan Documents explicitly pr ecluded reliance on such alleged oral representations and DAB's fraud counterclaim thus fails as a matter of law.

Those holdings are not affected by DAB's after-the-fact discovery, two years into the litigation, of an internal bank reco mmendation to extend the Lo ans. DAB could not possibly ha ve relied upon a document th at it was unaware of in 2011 and thus DAB's fraud counterclaim re mains based solely on alleged, non-actionable oral representations. The key que stion on either a m otion to renew or a motion to vacate based on newly discovered facts is the same: would the new facts have likely changed the pri or determination? If the IA S Court had grappled wi th that questi on, it would have reached the inescapable conclusion: the Action Plan cannot be the basis for a fra ud counte rclaim because DAB did not know the

document existed. The IAS Court's grant of DAB's motion to renew and vacate must be reversed.

The IAS Court also erred in spontaneously directing DAB to file an amended pleading. This unorthodox procedure violated the CPLR's requirement that the Court evaluate the viability of proposed new claims before permitting a party to amend a pleading. Had the Court performed the necessary evaluation, it would have been forced to conclude that amendment of DAB's pleading to incorporate the Action Plan would be futile because the plan was never communicated to DAB; it is not a Loan Document, and DAB is not a party to it; it fails to comply with the language of the Loan Documents governing contractual modifications; its proposed terms differ materially from the terms repeatedly alleged by DAB; it was subject to conditions precedent that were unsatisfied; and it was swiftly revoked by the Workout Committee upon learning that DAB had misappropriated Loan funds. Simply put, DAB cannot predicate any claim or defense on the Action Plan, and a finding by this Court that an internal bank memorandum that is never communicated to the borrower can be transformed, years later, into a binding contract would reverberate through the banking industry. The IAS Court's direction to DAB to amend its answer and counterclaims must be reversed, and DAB's amended pleading stricken.

Finally, the IAS Court should be directed to consider Mortgagee's summary judgment motion based on the papers submitted as of May 1, 2013. DAB does not dispute that the Mortgages are duly recorded first and second liens and that the Loans have been unpaid since the contractually stated maturity date of March 1, 2011. Mortgagee has "establishe[d] a *prima facie* case for foreclosure by production of the mortgage documents and proof of default," Bank Leumi Trust Co. of New York v. Lightning Park, Inc., 215 A.D.2d 246, 247 (1st Dep't 1995), and no party has raised a triable issue of fact precluding foreclosure. (See pp. 18-19, infra). During the past two years, DAB has not paid a dime toward its $24 million mortgage debt, nor toward property taxes, maintenance, or preservation of zoning rights and permits, all of which have been funded by Mortgagee. DAB is manifestly unable or unwilling to satisfy its obligations. Mortgagee's 16-month-old summary judgment motion must be granted before the continued passage of time leads to the permanent loss of the Mortgaged Property's zoning entitlements, irreparably harming the Mortgaged Property and DAB's creditors.

QUESTIONS PRESENTED

> Can a claimant whose fraud claim is dismissed because the claimant is legally barred from relying on alleged oral representations re-assert the same fraud claim based on a document, the content and existence of which were completely unknown to the claimant?
>
> Can such a document be the basis for renewal of a motion to dismiss that has already been granted and affirmed on appeal,

or vacatur of the affirmed order granting dismissal, when the claimant/movant failed to request any such documents in discovery and obtained the document only after being directed to request it by the Court almost two years after the litigation was commenced and more than one year after a pending summary judgment motion had been fully briefed?

Can an affirmed order be vacated on the ground of "fraud, misrepresentation, or other misconduct" where the only "misconduct" alleged was that a litigant did not voluntarily produce irrelevant documents that the litigant repeatedly stated it possessed but which were, nonetheless, never requested by the movant?

Can an internal "action plan" which was not communicated to a note obligor, which required the satisfaction of certain conditions precedent (none of which occurred), and which was revoked several weeks later, constitute an enforceable modification of a promissory note, notwithstanding that, by its nature, the plan carries no indicia of offer and acceptance sufficient to satisfy the promissory note's express requirement that modifications be effected by written agreement?

Can a mortgagor in maturity default block foreclosure by asserting –

> a waiver defense even though the mortgage includes a "no waiver" provision and the mortgagor cannot identify any intentional and knowing renunciation by the mortgagee of its right to foreclose?
>
> estoppel, unclean hands, bad faith or unconscionability defenses when the mortgage expressly and emphatically precludes the mortgagor from relying on the alleged statements complained of?

The answer to each of the above questions is, no, and the Order of the IAS Court must be reversed.

FACTUAL BACKGROUND

I. RELEVANT PROVISIONS OF THE LOAN DOCUMENTS

An extension of the Loans' maturity date would have entailed the modification of the Project Loan Note and Building Loan Note (together, the "Notes"), which set the maturity date, and modification of the Building Loan Agreement, which governs disbursement of construction funds.

The Notes contain identical provisions controlling maturity extensions: "No executory agreement unless in writing and signed by Holder, and no course of dealing between Maker, the endorser(s) or guarantor(s) hereof, or any of them, shall be effective to change or modify or discharge, in whole or in part, this Note." (R. 141, 247) (emphasis added). In addition, the Notes provide that they "may not be terminated or amended orally, but only by a termination or amendment in writing signed by Holder." (R. 139, 245).

These provisions were followed by the parties two years before the events at issue, when they extended the maturity date of the Project Loan Note. On August 21, 2008, DAB and Brooklyn Federal signed a Loan Modification Agreement which, just as DAB claims now, extended the final maturity date of the Project Loan, from December 1, 2008 to March 1, 2011. (R. 193-98). That document was signed, before a notary, by DAB, by Brooklyn Federal's Senior Vice-President and Chief Lending Officer, and by the guarantor of the Loans. In contrast to the Action

Plan, the 2008 Loan Modification Agreement was drawn by counsel, not by loan officers, was executed by the borrower and guarantor and notarized, and manifested a clear intent by DAB and Brooklyn Federal to extend the maturity date of the Loans based on definite and agreed-upon terms.

The Building Loan Agreement states that "[n]either this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument." (R. 881).

The Building Loan Mortgage states that it "cannot be altered, amended, waived, modified or discharged orally, and no executory agreement shall be effective to modify, waive or discharge, in whole or in part, anything contained in this Mortgage unless it is in writing and signed by the party against whom enforcement of the modification, alteration, amendment, waiver or discharge is sought." (R. 928). The Building Loan Mortgage also contains the following explicit acknowledgement by DAB:

> The Mortgagor recognizes that, in general, borrowers who experience difficulties in honoring their loan obligations, in an effort to inhibit or impede lenders from exercising the rights and remedies available to lenders pursuant to mortgages, notes, loan agreements or other instruments evidencing or affecting loan transactions, frequently present in court the argument, without merit, that some loan officer or administrator of the lender made

> an oral modification or made some statement that could be interpreted as an extension or modification or amendment of one or more debt instruments and that the borrower relied to its detriment upon such "oral modification of the loan document". For that reason, and in order to protect the Mortgagee from such allegations in connection with the transactions contemplated by this Mortgage and the Building Loan Agreement, the Mortgagor acknowledges that this Mortgage, the Note, the Building Loan Agreement, and all instruments referred to in any of them can be extended, modified or amended only in writing executed by the Mortgagee and that none of the rights or benefits of the Mortgagee can be waived permanently except in a written document executed by the Mortgagee. The Mortgagor further acknowledges the Mortgagor's understanding that no officer or administrator of the Mortgagee has the power or the authority from the Mortgagee to make an oral extension or modification or amendment of any such instrument or agreement on behalf of the Mortgagee.

(R. 933) (emphasis added).

II. THE FEBRUARY 2011 ACTION PLAN

The Action Plan was a preliminary step in a potential extension of the maturity date of the Loans, which were classified as substandard. The document provides an in-depth analysis of various risk factors relating to the Loans, including DAB's financial condition and the value of the collateral, and reflects the routine risk-management that regulated financial institutions are required to perform when making or modifying loans. In fact, in 2008, federal banking regulators issued an Interagency Statement "urg[ing] all lenders and servicers to adopt systematic, proactive, and streamlined mortgage loan modification protocols

and to review troubled loans using these protocols." Federal Interagency Statement on Meeting the Needs of Creditworthy Borrowers (2008); see also Federal Reserve SR-07 (2009) (encouraging banks to perform "comprehensive reviews of borrowers' financial conditions"). The purpose of the Action Plan was risk-management, not the creation of a binding contract.[3]

Based on the risk factors relating to the Loans, the Workout Committee recommended that the bank offer DAB two new six-month extension options, subject to conditions.[4] The Action Plan required DAB to pay an extension fee of .25% of the loan balance for each six-month term. Once the Workout Committee approved the Action Plan, written authorization was required from OTS before Brooklyn Federal could implement the plan and grant an extension. The Action Plan states: "An OTS 'non-object' is required as this loan is rated substandard and is a maturity extension." (R. 808) (emphasis in original). There is no dispute that (1) the Action Plan was never provided to DAB prior to this litigation, and (2) DAB was unaware that the document existed or that this internal process had occurred. (R. 57).

[3] Affirming the decision below could substantially affect banking industry procedures and practices, effectively turning any internal board document into a potential liability.

[4] Demonstrating the preliminary nature of the Action Plan, the conditions for the extension options are not specified. However, the Project Loan Note and Building Loan Note each contain eight very specific extension conditions, only some of which overlap. (R. 142-43, 248-50).

However, DAB *was* aware that OTS approval was required and had never been obtained. DAB acknowledged in its initial Answer and Counterclaims that it was "repeatedly" advised that Brooklyn Federal had applied to "the federal Office of Thrift Supervision ('OTS') for permission to explicitly and in writing extend the maturity date of The Loan," which permission was never obtained. (R. 349; see also R. 425).

After the Workout Committee reviewed and approved the Action Plan, Brooklyn Federal sought OTS approval to extend the Loans, but while that request was pending, the Workout Committee rescinded the Action Plan and decided to sell the Loans instead. The reasons for this rescission are uncontested – Zhavian was caught diverting Building Loan proceeds, and the Loans were deemed too risky. The March 22, 2011 memorandum rescinding the Action Plan states:

> Due to significant issues concerning the guarantor's [i.e., Zhavian's] honesty we are requesting to withdraw the previously approved extension request.
>
> On several occasions we have caught him diverting money he has been given via construction loan advances which has been brought to our attention by the contractor who failed to be paid. . . .
>
> We recommend this sale as a better alternative to disbursing additional monies and then running the risk of needing takeout financing to repay or the considerable risk that Mr. Zhavian, the guarantor/owner, will do something to endanger our position.

(R. 957).

The Brooklyn Federal witnesses all testified that their perception of Zhavian as untrustworthy was a major reason why the bank decided to sell the Loans. (R. 943, 947, 953, 961-62, 963, 967-68, 971). Loan officer Richard Maher testified that the Loans were "always problematic." (R. 972-73). Between the dates of June 28, 2010 and October 12, 2010 alone, there are nine entries on Brooklyn Federal's internal "history sheets" stating negative developments regarding the Loans, including delinquent real estate taxes, difficulties with Zhavian, and mechanic's liens. (R. 978-80).

Contrary to its allegations in this action, DAB and its counsel were fully aware that Brooklyn Federal never agreed to extend the maturity date of the Loans. On May 24, 2011, DAB's counsel, Wallace, wrote to Brooklyn Federal's counsel, acknowledging that the Loans had matured nearly three months prior, on March 1, 2011, and that they had not been extended. Wallace wrote:

> I understand that the Loan termed out pursuant to the original Loan documents on March 1, 2011 and that our respective clients have been discussing an extension of that term so that the project may continue and the hotel built. The purpose of this letter is to provide you with certain information which may be helpful to you and your client in making a determination as to whether or not the Loan term should be extended.

(R.796) (emphasis added). Wallace explicitly requested "a written extension of the term of the Loan." (R. 797). As Wallace has repeatedly conceded in court, DAB never received any such written extension. (R. 1208.26-1208.27, 832).

III. PROCEDURAL POSTURE

A. MORTGAGEE'S MOTION TO DISMISS

In a decision and two orders dated March 28, 2012, Justice Fried dismissed all three counterclaims asserted by DAB against Mortgagee and against third-parties Brooklyn Federal and State Bank of Texas ("State Bank," and together with Brooklyn Federal, the "Bank Defendants"). DAB's first counterclaim of fraudulent misrepresentation alleged that Brooklyn Federal misrepresented to DAB on August 26, 2010 that the maturity date of the Loans "would be" extended by 430 days, to approximately November 2011. (R. 348). DAB repled this counterclaim in opposition to motions to dismiss by alleging, through an affidavit from Zhavian, that Brooklyn Federal stated that the Loans *were* extended, not merely that they *would be* extended. DAB named Mortgagee as a defendant on this counterclaim because Mortgagee is the assignee of the Mortgages.

Although Zhavian acknowledged that he was "repeatedly" told that approval from OTS was required to extend the Loans, he alleged that –

> It was agreed at that time [i.e., August 26, 2010] that the loan funding and term would continue through the substantial completion of the Project approximately 430 calendar days from August 26, 2010. . . . There can be no doubt that as of August 2010 at the time that Brooklyn Federal and State Bank approved the Flintlock contract, they also extended the loans to "mid November" 2011 to conform and run parallel with the time schedule and budget as set forth in the approved Flintlock contract.

(R. 422-23, 425; see also R. 424). However, Zhavian's allegations are squarely contradicted by contemporaneous correspondence from Zhavian himself. On October 4, 2010, six weeks *after* the date of the purported 430-day extension, Zhavian sent a letter to Brooklyn Federal, exercising the final six-month extension option under the Loan Documents, from *September 1, 2010 to March 1, 2011*. (R. 517). This correspondence refutes DAB's allegation that the Loans were extended by 430 days on August 26, 2010.

In dismissing DAB's fraud counterclaim, Justice Fried noted that the Loan Documents are replete with provisions prohibiting oral modifications and that "DAB does not dispute that these provisions are contained within the valid, binding agreements between the parties." (R. 95). Justice Fried held that DAB's allegations did not give rise to a fraud claim because, in light of the "bargained-for, and agreed-upon, contractual provisions [in the Loan Documents], the allegation that DAB justifiably relied on unsigned, unwritten representations by agents acting on behalf of Brooklyn [Federal] or State Bank, cannot be credited." (Id.). This Court affirmed Justice Fried's decision on the same grounds, holding that "D.A.B. fails to allege the requisite reasonable reliance on these oral misrepresentations." (R. 855).

Justice Fried also dismissed DAB's second counterclaim, which alleged that Brooklyn Federal breached obligations relating to the funding of the Building

Loan, and DAB's third counterclaim, which alleged that Mortgagee and the Bank Defendants exaggerated the Loans' payoff amounts by miscalculating interest and late fees. Justice Fried's dismissal of DAB's second and third counterclaims was also affirmed by this Court. Mortgagee pointed out to Justice Ramos that the Action Plan has no bearing on either of these two counterclaims and that any vacatur order should exclude these counterclaims. (R. 1208.115, 1208.249). Nevertheless, Justice Ramos opted to enter DAB's proposed order without modification. To the extent the August 28 Order reinstated these claims, it is plainly erroneous and countermands this Court's May 28, 2013 affirmance of Justice Fried's order.

B. MORTGAGEE'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTIONS (MOTION NO. 6)

Following document discovery and with no depositions pending, Mortgagee moved for summary judgment on February 3, 2012. (R. 1218). Defendant Orchard Construction, LLC ("Orchard Construction") cross-moved, seeking to establish lien priority, but otherwise did not oppose Mortgagee's motion, while Flintlock cross-moved, *inter alia*, to amend its answer and counterclaims to assert tort and Lien Law claims that do not affect the enforceability of the Mortgages. (R. 1739, 1943).

In its opposition to Mortgagee's motion, DAB did not dispute the validity of the Mortgages or the fact of DAB's nonpayment. (R. 2144-45). [5] Instead, DAB debuted a new purported defense of estoppel based on the very same factual allegations and exhibits as DAB's dismissed fraud counterclaim. (R. 2127).

In reply, Mortgagee argued that DAB's new estoppel defense, even if it had been properly pled, was barred as a matter of law. Mortgagee noted that Justice Fried had held that DAB's allegations did not adequately allege reasonable reliance, and thus the dismissal order precluded DAB's new unpled estoppel defense, which required reasonable reliance. The motion and cross-motions were fully briefed on April 2, 2012.

1. The July 31, 2012 Oral Argument and Further Discovery

The parties appeared before Justice Ramos for the first time on July 31, 2012, for oral argument on Motion No. 6. At that hearing, DAB's counsel admitted that the maturity date of the Loans was never formally extended: "Now, the loan on the face of it [termed] out on March 2011, no question." (R. 832). Nevertheless, DAB claimed for the first time that depositions of the Bank Defendants were necessary. Despite having never previously subpoenaed any bank witnesses, DAB told the Court, incorrectly, that DAB had been seeking these

[5] Flintlock also opposed Mortgagee's motion, joined by defendants Edward Mills & Associates, Architects, P.C. and SMK Associates Inc. Like DAB, Flintlock did not dispute the validity of the Mortgages or DAB's default. (R. 2068-70, 2072-73). No other parties opposed Mortgagee's motion.

depositions since the outset of the case.[6] "Let's take the deposition of Joanne Gallo, another man, Bruce Gordon, who sent these e-mails, maybe Mr. Patel, who is an officer of the participant bank. That's all the defendant has been asking for since day one of this case." (R. 836; see also R. 840). Over Mortgagee's objection, the Court directed that depositions of the Brooklyn Federal witnesses be taken and instructed the parties: "I don't want this dragged out. I want depositions finished by the end of August [2012]." (R. 844).

Despite the Court's direction to complete depositions "by the end of August," DAB waited until September 11 and September 26 to first subpoena these witnesses. DAB then dragged its feet in scheduling the depositions, deposing its final witness on April 3, 2013, eight months after the Court's deadline.[7]

At her deposition, Joanne Gallo ("Gallo"), the head of Brooklyn Federal's Loan Workout Department, directly rebutted DAB's claims, testifying repeatedly that Brooklyn Federal never told DAB that the Loans would be extended and that she advised Zhavian that OTS approval was required to extend the Loans. (R. 2781-84). Gallo testified that an extension of the Loans never progressed beyond

[6] The only deposition that DAB had noticed as of the July 31, 2012 oral argument was that of Mortgagee, which DAB had not even attempted to schedule. Mortgagee and the Bank Defendants are independent, unrelated parties.

[7] Mortgagee informed the Court on numerous occasions that DAB was needlessly protracting these depositions. Mortgagee sent letters to the Court on August 15, 2012 (R. 2332) and October 24, 2012 (R. 2344-45) and raised the issue during status conferences on November 20, 2012 and January 8, 2013.

the first step – the internal approval by the Workout Committee of the general terms set forth in the Action Plan. (R. 2744-45). Gallo, of course, was referencing the Action Plan, which reference Wallace never pursued. Such approval did not extend the Loans because, as Gallo testified, Brooklyn Federal was under OTS supervision and could not modify loans without prior written OTS approval. (R. 2741, 2784-85). Gallo further testified that if and when OTS approval were granted, the terms of any extension would have to be memorialized in a written agreement like the 2008 Loan Modification Agreement. (R. 2772, 2775). DAB's counsel did not request production of a single document during Gallo's deposition, despite repeated reference to the Workout Committee's internal approval of the recommendation to extend the Loans.

At the direction of the Court, the parties filed supplemental briefs on April 18, 2013, incorporating deposition testimony into the summary judgment motion and cross-motions. DAB did not request additional discovery.

2. The May 1, 2013 Oral Argument and Further Discovery

The parties' next oral argument on the summary judgment motion and cross-motions was held on May 1, 2013. DAB told the Court of Gallo's testimony that the Workout Committee had accepted her department's recommendation to extend the maturity date of the Loans, prompting Justice Ramos to ask a question that DAB had never previously asked: "Was there a resolution or writing by the

board?" (R. 677). DAB responded, incorrectly, that it did not know where any such documents were. However, on January 19, 2012, before Mortgagee moved for summary judgment, it produced 1,137 pages of documents in response to document requests from DAB. Mortgagee's production included various documents stating that Brooklyn Federal's files for the Loans (the "Loan Files") would be delivered to Mortgagee at closing. (R. 1209, 1212, 1215, 1665). In addition, Mortgagee filed a copy of the Mortgage Loan Purchase Agreement (MLPA) as an exhibit in support of its summary judgment motion on February 3, 2012. The MLPA stated that "[p]romptly after the Closing Date, Seller shall deliver to Purchaser, or its designee, the Mortgage Loan Files, at such location as Purchaser shall designate." (R. 1665). Mortgagee also filed an affidavit on April 2, 2012 from one of its principals which stated as follows: "The facts set forth herein are based on my personal knowledge and my review of *the loan files provided to Mortgagee by Brooklyn Federal Savings Bank, the assignor of Mortgagee, of which I am the custodian*." (R. 2248) (emphasis added). Despite repeated notice of the location of the Loan Files, DAB never requested the production of any internal Brooklyn Federal documents.[8]

Upon learning that DAB had never requested any such documents, Justice Ramos directed DAB to serve new requests. Mortgagee objected, noting that the

[8] DAB's document requests sought only correspondence and agreements involving Mortgagee and its affiliate. (R. 469).

parties had appeared in Court several times after Gallo's deposition and "[n]obody said a word, a singular word, about needing additional documents – nobody served a document, nobody followed up a deposition with a letter requesting, by the way, do you have that." (R. 681-82). Mortgagee also noted that DAB had filed supplemental papers on April 18, 2013 and did not request additional discovery –

> We have rules. I would, respectfully, suggest we need to play by them. Otherwise we end up where we were last July, which is coming into court, everything is briefed and they say, "Oh, I need more discovery." Even the last time, when they told your Honor they noticed depositions [of Brooklyn Federal witnesses], they had not noticed any of the depositions that they took.

(R. 686-87). Nevertheless, Justice Ramos postponed consideration of the summary judgment motion and cross-motions and directed DAB to serve new document requests on Mortgagee. "Guess what? We're continuing again. You [DAB] make the demand on the plaintiff and we'll take it from there." (R. 687).

On May 8, 2013, as directed by the Court, DAB served new document requests, seeking for the first time all documents "which refer to, encompass discussions or directions about, or are otherwise relative to the loans made by Brooklyn Federal to DAB, specifically including, but not limited to . . . the extension of the maturity date of the loans." (R. 704-05). Within 48 hours of DAB's request, Mortgagee produced responsive documents, including the Action Plan.

3. The June 11, 2013 Oral Argument

On June 11, 2013, the parties returned to Court for a resumption of oral argument on Mortgagee's summary judgment motion. Seizing upon the Action Plan, DAB asked the IAS Court for leave to move to vacate Justice Fried's dismissal order based on newly found evidence. (R. 634). Once again, the Court deferred decision on Mortgagee's motion and from the bench granted DAB leave to seek renewal of Justice Fried's affirmed order. "Everything is held in abeyance. . . . So if I deny their motion to renew then I'll grant this motion [for summary judgment]." (R. 646-47).

THE DECISION BELOW

The parties appeared before the IAS Court on July 9, 2013 for oral argument on DAB's motion to renew and vacate (Motion No. 10) and Mortgagee's motion for summary judgment (Motion No. 6).

Ruling from the bench, Justice Ramos granted DAB's motion to renew and vacated Justice Fried's dismissal order, stating "Judge Fried's decision is withdrawn by me because now I am the judge." (R. 1208.37). Justice Ramos also, *sua sponte*, directed DAB to file an amended answer and counterclaims. (Id.) The Court refused Mortgagee's request for a decision on its motion for summary judgment, but granted Flintlock's cross-motion, from the same motion sequence, to amend its pleading. (R. 1208.36-1208.37).

The Court entered a short-form order on July 30, 2013, from which Mortgagee appealed on August 5, 2013. The next day, seeking to scuttle Mortgagee's appeal, DAB filed a notice of settlement in the IAS Court, requesting entry of a long-form order in place of the July 30 order. (R. 1208.1). Mortgagee filed a proposed counter-order that corrected errors in DAB's proposed order, such as DAB's failure to distinguish between its first counterclaim for fraud, which was at issue on Motion No. 10, and its second and third counterclaims, which were not at issue. (R. 1208.150). Mortgagee also noted that the Court partially disposed of Motion No. 6 by granting Flintlock's motion to amend but deemed the balance of Motion No. 6 "moot." (R. 1208.151). Notwithstanding these and other accurate corrections to DAB's proposed order, the IAS Court signed DAB's order, without modification, from the bench on August 26, 2013.

I. RENEWAL OF MORTGAGEE'S MOTION TO DISMISS AND VACATUR OF JUSTICE FRIED'S DISMISSAL ORDER (MOTION NO. 10)

The basis for the Court's grant of DAB's motions to renew and vacate is unclear. At the July 9 hearing, the Court stated that the Action Plan effectively nullified this Court's affirmance of Justice Fried's dismissal of DAB's fraud counterclaim.

> THE COURT: [L]et me focus your attention on what has caught my attention.
>
> MR. SCHARF: Sure.

> THE COURT: And that is the language from the Appellate Division. . . . Quote, "The loan documents expressly prohi bit oral term ination or amend ment and provide for term ination or amendment only in w riting signed by Brooklyn Federal."
>
> MR. SCHARF: Yes.
>
> THE COURT: Cl early, that 's what they wanted to see. For the purposes of a 3211 m otion only and not a 3212 m otion, doesn't that stop us ri ght there? We already now know that D.A.B. can satisfy the Appellate Division's most stat ed concern. And t hey repeat that. They say m odified or amended onl y in writing executed by Brookl yn Federal. They don't say agreement, they don't say how detailed or procedurally how it has to be drafted. It doesn't necess arily have to be authenticated. They just say from their poi nt of view, a writing si gned by Brooklyn Federal. We've go t that now and I think if Judge Fried had seen that, he would be com pelled to say 3211? I don't think so.

(R. 1208.21).

At the same time, however, the Court acknowledged the undisputed fact that the Action Plan was unknown to DAB un til May 2013. (R. 1208.26). Thus, even if the Action Plan were "an amendment . . . in writing signed by Brooklyn Federal" (which it plainly is not), based on th e IAS Court's own findings DAB could not have reas onably relied on th e Action Plan in 2010 and 2011 because DAB was unaware o f it. The Action Plan therefor e does not affect the dism issal of DAB's fraud counterclaim.

Moreover, the IAS Court stated repeated ly that, in its view, the Action Plan *negates* DAB's fraud counterclaim. Accordi ng t o the Court, by virt ue of the

Action Plan, Brooklyn Federal's alleged re presentations to DAB were actually true. "This is not a false representation anym ore. It is not a m isrepresentation. It was a representation of an accurate fact. The bank had approved it. . . . [T] here is no fraud a nymore. It was an accurate repr esentation of wha t the bank had done." (R. 1208.23, 1208.28-1208.29; see also R. 1208.24). Again, based on the Court's own findi ngs, the Action Plan did not s upport D AB's fraud allegations and t hus did not warrant renewal of Mortgagee's mo tion to dismiss or vacatur of Justice Fried's order.

Finally, the IAS Court m ade no fi nding as to whether DAB demonstrated either "reasonable justification for the fa ilure to present such facts o n the prior motion" or "fraud, m isrepresentation, or other misconduct" by Mortgagee, as required by CPLR 2221 and 5015(a)(2), (3). DAB adm itted that it had not served document requests that encompassed the Action Plan and that DAB obtained the document only because, as DAB's counsel admitted, DAB belat edly served "a discovery dem and which, qu ite frankly, your Honor, was insisted upon by you." (R. 1208.13). The Court appeared to ac cept at face value DAB's false and unsupported clai ms that DAB refrained fr om serving pert inent document request s during the prior 22 months that th e action was pending because DAB was somehow duped by Mortgagee into belie ving that si mply requesting "all

documents pertaining to the Loans" would have been futile. Mortgagee attempted to address DAB's baseless allegations squarely but was cut off by Justice Ramos.

> MR. SCHARF: . . . So, renewal isn't appropriate because the defendant, the borrower, D.A.B., cannot demonstrate that it exercised the appropriate due diligence to learn of the information that they are now claiming is, "alas, the proverbial smoking gun."
>
> THE COURT: Is this a path you folks want to go down? Off the record for a second.

(R. 1208.19). Off the record, Justice Ramos declared that the Action Plan should have been produced at the outset of the litigation. The Court did not address the fact that DAB admittedly did not request any such documents until May 8, 2013. DAB's failure to ask for documents that were always available is the basis for DAB's argument that the Action Plan was withheld by Mortgagee. The argument is meritless and is intended to mask DAB's lack of diligence.

In sum, the IAS Court's grant of DAB's motion to renew and vacatur of Justice Fried's dismissal order was based on flawed findings. Although the IAS Court found that the Action Plan could have supplied the missing element of reasonable reliance for DAB's fraud claim based on the language of this Court's May 28, 2013 decision, the Court also noted that the Action Plan was unknown to DAB during the events at issue and it held that the Action Plan contradicted DAB's allegations of a false representation. Furthermore, although it is undisputed that DAB did not serve pertinent document requests until May 8, 2013, and DAB

has presented no evidence whatsoever of any misrepresentation or misconduct by Mortgagee, the IAS Court failed to consider DAB's lack of diligence in discovery.

II. AMENDMENT OF DAB'S ANSWER AND COUNTERCLAIMS

The IAS Court's direction to DAB to amend its pleading was prompted by the Court's realization that DAB had not yet articulated a cognizable claim. "I'm trying to think what do we have here. Is it a contract? Is it some kind of a fraud? Is it – I don't know what it is. I shouldn't have to draft that claim. They should draft it." (R. 1208.26).

Mortgagee's counsel objected that DAB had not requested leave to file an amended pleading and that, moreover, none of DAB's various allegations stated a cause of action.

> MR. SCHARF: . . . I am asking you – let's deal with it from any theory. Let's just deal with breach of contract. Please, just give me a couple of minutes, Judge, because I know it's troubling you and I am trying to address it.
>
> THE COURT: Sure. You are putting me in a position of being an advocate for [DAB] and I shouldn't. I don't know what their claim is now.
>
> MR. SCHARF: They have stated what their claim is. Mr. Wallace put it in his affidavit.
>
> THE COURT: Good, then let him replead.

(R. 1208.27; see also R. 1208.26, 1208.28-1208.29).

Next, the Bank Defendants' counsel attempted to explain that the Action Plan has no legal significance because it was an internal document that was

undisputedly unknown to DAB during the events at issue. (See R. 1208. 34, 1208.26). However, the Court now disputed that fact.

> THE COURT: Are you contending this is an internal office memorandum? . . . Have you looked at the affidavit of Ms. Gallo? She said no further action by the board was required. It was a done deal.
>
> MR. HARVEY: Your Honor –
>
> THE COURT: Oh, you want to testify now?
>
> MR. HARVEY: No, Your Honor. Looking at the document on its face, it says this is a commercial action plan. This was a plan that had certain contingencies –
>
> THE COURT: Excuse me. I take Ms. Gallo, who is the officer of your bank – I guess she is not working for you anymore – an officer of your bank telling me in an affidavit, I think in May of 2013, that no further action was required by the board of directors, that means to me it's a done deal. They didn't have to do anything else.
>
> Now, you saying, "Oh, the defense is that it was never delivered to the defendant"? We'll find out. We haven't had any discovery in this case; remember? The smallest – the first bit of discovery in this case reveals a document that everyone said didn't exist and it does.
>
> You're [DAB] granted leave to amend your complaint.

(R. 1208.34-1208.35).

The Court's observation that the purported extension "was a done deal" overlooked multiple paragraphs of Gallo's affidavit that made clear that approval by the Workout Committee was merely a preliminary step in modifying the Loans. Gallo stated that "[i]f the [Workout Committee] accepted the recommendation [to extend the Loans], then consent would be sought from the bank's primary

regulator, the U.S. Treasury Department's Office of Thrift Supervision (OTS), a requirement of any loan extension." (R. 790). Gallo also stated that following OTS approval, the proposed extension "would be memorialized in a written agreement with DAB" upon DAB's "payment of a fee of .25% of the loan balance for each six-month term." (Id.). In fact, Gallo's statement regarding full board approval was not made to suggest that an extension had been granted, but rather to respond to inaccurate statements by counsel and the IAS Court at the May 1, 2013 hearing[9] – statements that required correction because the Court warned Mortgagee that "[i]f we have a document that is said to exist and it is not around and you're in the shoes of the bank, uh oh." (R. 685).

In addition, the Court's statement that there had been little or no discovery in this case was mistaken. In January 2012, Mortgagee responded to DAB's document requests by producing 1,137 pages of documents. At Justice Ramos' direction, DAB deposed four witnesses of its choosing and served a second round of document requests, to which Mortgagee responded by producing an additional 964 pages of documents. The Court's statement was therefore without basis and,

[9] Wallace incorrectly told the IAS Court on May 1, 2013 that "The officers in charge of the loan went to the loan committee and the full Board of Directors of the bank and requested an extension of that loan and it was approved. We know that from the testimony." (R. 676). To the contrary, the bank officers testified that approval of the full board was not required nor sought. (See, e.g., R. 2856, 2858). Nonetheless, Wallace's misstatement that the full board of directors had approved the extension was subsequently repeated by the Court several times during the May 1, 2013 hearing (see, e.g., R. 682, 684, 686), prompting Gallo to correct the record in her affidavit.

in any event, none of this discovery has produced a triable issue of fact that precludes summary judgment on Mortgagee's foreclosure claims.

Finally, the Court's statement that "everyone said [the Action Plan] didn't exist" is also mistaken. Mortgagee never denied the existence of internal bank documents referencing a potential extension of the Loans. Mortgagee merely stated, correctly, that the maturity date of the Loans was never extended, a fact that DAB's counsel acknowledged in his May 24, 2011 letter to Brooklyn Federal and has repeatedly admitted in open court. (See pp. 5-6 supra).

III. MORTGAGEE'S MOTION FOR SUMMARY JUDGMENT (MOTION NO. 6)

At the July 9 hearing, Justice Ramos ruled that Mortgagee's summary judgment motion was "moot" given the Court's direction to DAB and Flintlock to amend their pleadings.[10] (R. 1208.32). The Court pointedly refused to deny the motion because it did not want Mortgagee to appeal it. (R. 1208.36; see also R. 1208.31).

However, the Court reconsidered its position at the August 26, 2013 hearing, after being informed that Flintlock's motion to amend was part of Motion No. 6, a point DAB scrupulously avoided mentioning in its proposed order. (R. 1208.262). Both Mortgagee and Flintlock requested an explicit reference to Motion No. 6 in

[10] Flintlock has conceded that its proposed counterclaims "ha[ve] nothing to do with" the foreclosure of the Mortgages and that "it is a proper procedure to sever any of the claims, try them separately." (R. 689-90).

the order, leading the Court to ask whether it would "be better for everyone's sake if I would deny the motion for summary judgment as moot in light of the fact that the parties are repleading?" (R. 1208. 266). However, DAB objected to any mention of Motion No. 6 in the order out of fear that this Court would then have a full record, and the Court dropped the suggestion, signing DAB's proposed order unchanged.

DAB'S AMENDED ANSWER AND COUNTERCLAIMS

Following entry of the July 30 short-form order, DAB filed an amended pleading, asserting three new counterclaims and five new affirmative defenses.

DAB's first counterclaim, for breach of contract, alleges that the Action Plan is an enforceable extension of the Loans' March 1, 2011 maturity date, which Brooklyn Federal breached by declaring the Loans due and payable on March 1, 2011. (R. 1208.96). DAB's second counterclaim, also for breach of contract, alleges that Brooklyn Federal breached a purported obligation to fund the Building Loan after March 1, 2011. (R. 1208.98-1208.99).

DAB's third counterclaim, a combination claim denoted as "fraud/bad faith/lack of fair dealing," essentially re-pleads the fraud allegations dismissed by Justice Fried and affirmed by this Court – namely, that Brooklyn Federal purportedly approved a construction contract on August 26, 2010 and thereby extended the Loans' maturity date by 430 days therefrom, to November 2011. (R.

1208.99-1208.101). According to DAB, Brooklyn Federal took this action "so that the status of the DAB loans on its books would be satisfactory to federal regulators," but then it decided to sell the Loans "in order to survive regardless of its duty of fair dealing and good faith with its borrower, the Defendant DAB." (Id.).

DAB's new affirmative defenses are waiver, estoppel, unconscionability, unclean hands, and "bad faith and lack of fair dealing." (R. 1208.88-1208.92).

ARGUMENT

I. DAB'S MOTIONS TO RENEW AND VACATE WERE IMPROVIDENTLY GRANTED BECAUSE DAB CANNOT SATISFY THE REQUIREMENTS OF CPLR 2221 OR CPLR 5015

To justify renewal under CPLR 2221(e) or vacatur under CPLR 5015(a)(2), DAB was required to demonstrate (i) that the newly discovered evidence would likely have caused Justice Fried to deny Mortgagee's motion to dismiss and (ii) that the new evidence could not have been produced at the time of the prior motion even if DAB had exercised due diligence. CPLR 2221, 5015(a)(2); Banow v. Simins, 53 A.D.2d 542, 542 (1st Dep't 1976); DeCarvalhosa v. Adler, 57 A.D.3d 367, 368 (1st Dep't 2008). DAB's motion failed to satisfy these requirements.

To justify vacatur under CPLR 5015(a)(3), DAB was required to show that Mortgagee procured the dismissal order by "fraud, misrepresentation, or other misconduct." CPLR 5015(a)(3); Nichols v. Curtis, 104 A.D.3d 526, 529 (1st Dep't

2013). DAB failed to make such a showing, and its allegations of fraud and misconduct are blatantly false.

A. THE ACTION PLAN DOES NOT AFFECT JUSTICE FRIED'S DISMISSAL OF DAB'S FRAUD COUNTERCLAIM BECAUSE DAB ADMITS THAT IT WAS UNAWARE OF THE ACTION PLAN'S EXISTENCE DURING THE EVENTS AT ISSUE

In affirming Justice Fried's dismissal of DAB's fraud counterclaim, this Court held that DAB cannot plead "the requisite reasonable reliance" on any alleged oral extension of the Loans' maturity date because the Loan Documents expressly precluded such reliance absent a written and executed extension. (R. 855). Even if the Action Plan were a written and executed extension (which it plainly is not), it is nevertheless irrelevant to DAB's fraud allegations because, as Justice Ramos noted, the Action Plan was "not known to the defendant when they drafted the counterclaim." (R. 1208.26). Again, the Action Plan was an internal bank document which unquestionably was never communicated or delivered to DAB and which was subsequently rescinded when DAB's principal was found to have misappropriated Building Loan funds. The Action Plan, a document first obtained by DAB during discovery, was obviously not relied upon by DAB during the events at issue and thus would not have affected Justice Fried's dismissal of DAB's fraud counterclaim. DAB's motions to renew and vacate were improperly granted, and should be reversed. Nichols, 104 A.D.3d at 529 (denying motions to renew and vacate because new facts would not have changed prior determination).

B. DAB HAS NO REASONABLE JUSTIFICATION FOR FAILING TO PRESENT THE ACTION PLAN ON THE PRIOR MOTION BECAUSE DAB MADE NO EFFORT TO OBTAIN THE ACTION PLAN UNTIL IT WAS DIRECTED TO DO SO BY THE IAS COURT ON MAY 1, 2013

DAB also cannot satisfy the second requirement of CPLR 2221(e) and 5015(a)(2) – a reasonable justification for failing to present the Action Plan to the Court in a timely manner – because DAB made *no* effort to obtain this document until long after Justice Fried issued his decision. Indeed, when Brooklyn Federal's Gallo testified on January 7, 2013 – three weeks before DAB's deadline to perfect its appeal of Justice Fried's order – that the Workout Committee approved her department's recommendation to extend the Loans, DAB's counsel did not ask whether that approval was reduced to writing, nor did counsel attempt to locate any documents after the deposition. (R. 944-45). DAB admits that it served its May 8, 2013 document request only after being directed to do so by the IAS Court. (R. 1208.13, 633).

In an attempt to justify its failure to pursue discovery on its own initiative, DAB accuses Mortgagee of concealing the location of the Loan Files, implying that DAB would have sought the Loan Files if only it had known whom to ask. "*No one*, including plaintiff ORCHARD'S attorneys who were present and participated in each of these depositions revealed that BROOKLYN FEDERAL'S file regarding these loans was in ORCHARD'S possession." (R. 61) (emphasis in

original). This accusation is patently false. [11] First, DAB never requested the production of the Loan Files, instead focusing its document requests on an alleged conspiracy between Brooklyn Federal and Mortgagee, a claim long ago abandoned by DAB. (R. 469). Second, the location of the Loan Files was repeatedly disclosed to DAB. Mortgagee's January 2012 document production included correspondence discussing the delivery of the Loan Files to Mortgagee, while the MLPA, both produced and filed as an exhibit to Mortgagee's summary judgment motion, stated that "the Mortgage Loan Files" would be delivered to Mortgagee "[p]romptly after the Closing Date." (R. 1208.13, 1665). Furthermore, one of Mortgagee's principals filed an affidavit in support of summary judgment in which he stated that he was the custodian of "the loan files provided to Mortgagee by Brooklyn Federal." (R. 2248).

DAB seeks to deflect attention from its carelessness by making wildly baseless accusations of wrongful conduct. However, DAB has no excuse for failing to request the Loan Files for nearly two years until directed to do so by Justice Ramos. "Upsetting though it might be to plaintiff, the fact is that plaintiff has, thus far, failed to ask for any brokerage account statements. The Individual . .

[11] Moreover, DAB's suggestion that it inquired about the location of the Loan Files at any deposition is disingenuous. DAB's counsel does not point to a single instance in which he made any such inquiry. Furthermore, Gallo informed DAB at her deposition that Brooklyn Federal's corporate records were in the possession of Brooklyn Federal's corporate successor, Investors Bank in "Short Hills, New Jersey." (R. 2728). DAB never sought any documents from Investors Bank.

. Defendants were sim ply not required to provi de documents which were not requested by plaintiff." 320 West 13th St., LLC v. Wo lf Shevack, Inc. , No. 603730/2007, 2013 N.Y. Misc. LEXIS 2297, at *8-9 (Sup. Ct. N.Y. Cnty. May 21, 2013); Richardson v. Brisard & Brisard, Inc. , No. 10463/2010, 2012 N .Y. Misc. LEXIS 3215, at *21-22 (Sup. Ct. Kings Cnty. July 9, 2012) (Demarest, J.) (denying defendants' m otion to preclude documents that were not produced i n discovery because "defenda nts never served a dema nd for the production of documents pursuant to CPLR 3120"). Un fortunately for D AB, a litigant is not obliged to volunteer documents to its adversary.

Justice Ramos did not consider whether DAB had exercised due diligence in pursuing discovery. Howeve r, based on his off-t he-record comments, h e appears to have accepted DAB's baseless al legations, which were mad e with great theatrics, that DAB was somehow duped into sleeping on its rights in discovery. If Mortgagee had been perm itted by the Court to address DAB's allegations at oral argument, Mortgagee would ha ve demonstrated, as set forth above, that DAB was repeatedly told that Mortgagee possesse d the Loan Files and that DAB had no reasonable justification for fa iling to pursue discovery. As this Court has held, renewal of a m otion that has already b een deci ded and affirmed on appeal is limited –

> strictly to those cases in which crucial facts were at the time of the original m otion extant, but could not have

> been obtained by the party seeking renewal, even if due diligence had been exercised. Moreover, the parties seeking renewal would be under a heavy burden to show, in addition, that he was unable at any time before the perfection of the appeal, to bring the new facts to the motion court's attention as he would have been permitted to do if in fact the criteria for renewal were satisfied.

Beiny v. Wynyard (In re: Beiny), 132 A.D.2d 190, 210 (1st Dep't 1987) (emphasis added). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Elder v. Elder, 21 A.D.3d 1055, 1055 (2d Dep't 2005) (affirming denial of motion to renew that was "based upon evidence that, with due diligence, could have been discovered earlier").

Because DAB made no effort to obtain documents pertaining to a purported extension of the maturity date of the Loans, its motions to renew and vacate were improperly granted. Rosado v. Edmundo Castillo Inc., 54 A.D.3d 278, 279 (1st Dep't 2008) ("Plaintiff's motion to renew was properly denied since he failed to offer a reasonable excuse for not presenting the new evidence on the prior motion when it could have been obtained through discovery."); Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 481 (1st Dep't 2007) (same); DeCarvalhosa, 57 A.D.3d at 368 (motion to vacate properly denied because "the primary cause of defendant's failure to discover the new evidence on which she based her post-trial motion was her own lack of due diligence, not plaintiff's misconduct"). DAB did not introduce

a shred of evidence justifying its lack of due diligence or supporting its feckless allegations of misconduct.

II. THE IAS COURT IMPROVIDENTLY GRANTED DAB LEAVE TO AMEND ITS PLEADING

This Court "has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted, and leave to amend will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law." Davis & Davis, P.C. v. Morson, 286 A.D.2d 584, 585 (1st Dep't 2001) (internal citations omitted). "[T]he granting of leave to amend 'without passing upon the validity of the causes of action as amended . . . represents a procedure which is no longer tolerable.'" Non-Linear Trading Co. v. Braddis Assocs., Inc., 243 A.D.2d 107, 116 (1st Dep't 1998) (citation omitted).

In directing DAB to amend its pleading, the IAS Court improperly declined to pass upon the validity of any proposed causes of action, telling Mortgagee's counsel, "You are asking me to dismiss a claim I haven't seen." (R. 1208.29). However, the IAS Court's directive reverses the burdens on such a motion. DAB was required to demonstrate that it can plead a valid cause of action by submitting a proposed new pleading or affidavit of merits and evidentiary proof. The absence of any such pleading or affidavit here is alone sufficient to justify reversal of the IAS Court's order. See CPLR 3025(b) ("[a]ny motion to amend or supplement

pleadings shall be accompanied by the proposed amended or supplemental pleading"); Pollak v. Moore, 85 A.D.3d 578, 579 (1st Dep't 2011) (motion to amend properly denied "as plaintiff failed to annex a copy of a proposed second amended pleading to his motion papers, and he did not otherwise offer an affidavit of merit"); Fernandez v. HICO Corp., 24 A.D.3d 110, 111 (1st Dep't 2005) (motion to amend "properly denied for failure to submit a copy of the proposed pleading").

If the Court had required DAB to submit a proposed pleading and performed the requisite analysis, it would have readily determined that leave to amend was improper. DAB's first breach of contract counterclaim fails as a matter of law because the Action Plan is not a contract between Brooklyn Federal and DAB. The Action Plan was not delivered or communicated to DAB, and DAB knew nothing about it until years after the Loans had matured and the Action Plan had been rescinded. Furthermore, because there was never an enforceable extension of the March 1, 2011 maturity date, Brooklyn Federal had neither the obligation nor the ability to fund Building Loan advances after that date. DAB's two breach of contract counterclaim thus fail as a matter of law.

DAB's third counterclaim for "fraud/bad faith/lack of fair dealing" and its five new affirmative defenses, none of which depend upon the Action Plan, all fail for the reasons set forth in this Court's May 28, 2013 Decision and Order and

because they impermissibly seek to nullify the Loan Documents' clear provisions governing contractual modifications.

DAB's inability to plead any viable claim or defense is particularly fatal because DAB has been granted all of the discovery that it has requested as well as some discovery that it has not, and yet 43 of the 46 paragraphs of factual allegations in DAB's amended pleading are asserted "upon information and belief." (R. 1208.74-1208.87). DAB's counterclaims and defenses are factually and legally meritless, and the IAS Court's grant of leave to amend must be reversed and DAB's new pleading stricken. Peach Parking Corp. v. 346 West 40th St., LLC, 42 A.D.3d 82, 87 (1st Dep't 2007) (reversing grant of leave to amend because proposed new claim was not actionable); see also Perrotti v. Becker, Glynn, Melamed & Muffly LLP, 82 A.D.3d 495, 499 (1st Dep't 2011) (leave to amend properly denied because proposed cause of action is "palpably insufficient [and] clearly devoid of merit") (citation omitted).

A. DAB'S BREACH OF CONTRACT COUNTERCLAIMS ARE PALPABLY INSUFFICIENT AS A MATTER OF LAW BECAUSE THE ACTION PLAN DOES NOT SATISFY THE BASIC CRITERIA OF A CONTRACTUAL MODIFICATION

As Mortgagee and the Bank Defendants each attempted to explain at oral argument on July 9, 2013, a precedent of this Court squarely disposes of DAB's allegations. In Waterways Ltd. v. Barclays Bank PLC, 202 A.D.2d 64, 73 (1st Dep't 1994), "[t]he primary issue on appeal . . . [was] whether there was a

modification of the loan agreement or an enforceable contract to forbear." Just like here, the loan at issue in Waterways had been modified once before by a formal loan modification agreement. Id. at 66. Similarly, like DAB alleges here, bank officers met with the borrower in Waterways to discuss a modification, and after one such meeting, a bank officer drafted an internal memo setting forth terms agreed-to by the parties. Id. at 67. Like here, any modification of the loan was subject to conditions precedent, and like here, the borrower's representative in Waterways sent a letter to the lender acknowledging that a formal modification agreement was required. Id. at 68-69. *Unlike* here, in Waterways, the internal memo setting forth proposed loan terms was accidentally faxed to the borrower. Id. at 68.

On these facts, this Court held that the borrower could not establish an enforceable modification of the loan. Each point of the Court's reasoning applies here.

> First, an internal office memorandum which is not even addressed to one of the purported parties to the alleged agreement, by its nature, carries no indicia of an offer and acceptance sufficient to satisfy the 'agreement' language of paragraph 19 [of the promissory note].

Id. at 74. The Action Plan is an internal office memorandum addressed not to DAB, but to Brooklyn Federal's Workout Committee. By its nature, the Action Plan – an internal recommendation from the bank's management to its board –

carries no indicia of an offer and acceptance between lender and borrower sufficient to satisfy the provision of the Notes controlling contractual modifications. Indeed, the relevant provision of the Notes here is substantially the same as the relevant provision in Waterways:[12]

> *The Notes here –*
>
> "No executory agreement unless in writing and signed by Holder . . . shall be effective to change or modify or discharge, in whole or in part, this Note." (R. 141, 247).
>
> *The promissory note in Waterways –*
>
> "This Note may . . . be changed or terminated . . . only by an agreement in writing signed by the party against whom enforcement of such change or termination is sought." Id. at 66.

The Waterways Court then continued: "a second factor weighing against a finding of a binding modification in this case is the fact that the circumstances surrounding the August 1988 modification of the loan agreement demonstrate that the parties exercised formality in their prior course of dealing." Id. __ at 74. Likewise, here, in August 2008 the parties extended the final maturity date of the Project Loan – to March 2011 – by a formal Loan Modification Agreement which was drafted by counsel and executed, before a notary, by Brooklyn Federal's chief lending officer and by DAB's principal and the Loans' guarantor. (R. 197).

[12] Like analogous provisions in many contracts, both provisions track G.O.L. § 15-301, which provides that contracts containing 'no oral modifications' clauses "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

Next, the Waterways Court noted: "There is also the December 14, 1998 letter from George Robinson, which plaintiff seeks to make light of, that contains an acknowledgement by plaintiff's representative that formalization of the purported agreement was contemplated." Id. at 74. Here, there is the May 24, 2011 letter from Wallace, DAB's counsel, that acknowledges that the parties "have been discussing an extension," that Brooklyn Federal had not yet made "a determination as to whether or not the Loan term should be extended," and that "a written extension of the term of the Loan" was required. (R. 796-97). DAB clearly understood that no extension of the Loans had been granted.

Finally, this Court in Waterways held that "the condition precedent noted above also negates any finding that Barclays entered into a binding modification of the loan agreement." Id. at 74. Here, it is undisputed that, as stated in the first paragraph of the Action Plan, OTS approval was required before Brooklyn Federal could enter into an agreement to extend the maturity date of the Loans, and such approval was never granted.

In sum, just like the internal memorandum in Waterways, the Action Plan is not an enforceable modification of the Loans. This decision was presented to the IAS Court, who gave it short shrift. (R. 1208.28, 1208.34). But even ignoring Waterways, the IAS Court's grant of leave to amend violated numerous well-settled principles of contract law: (i) to create a bilateral contract, acceptance must

be communicated to the offeror; (ii) an unambiguous contract must be enforced according to its plain terms; (iii) a binding contract requires a manifestation of mutual assent to material terms; and (iv) an agreement does not become effective until all conditions precedent are satisfied or waived. These basic contract principles render DAB's allegations palpably insufficient as a matter of law and warrant reversal of the IAS Court's August 28 Order.

1. The Action Plan Was Never Communicated to DAB

It is undisputed that the Action Plan was never delivered to DAB and that DAB was never informed of the document's proposed terms. As DAB told Justice Ramos at oral argument on July 9, 2013: "We only found out a month ago, six weeks ago that [the Loans] had been extended in writing." (R. 1208.27). Because this Court has already held that under the Loan Documents, DAB could not reasonably rely on anything short of a written and signed extension, the fact that the Action Plan was never communicated to DAB is fatal to DAB's new breach of contract allegations.

"[I]t is essential in any bilateral contract that the fact of acceptance be communicated to the offeror." Gyabaah v. Rivlab Transp. Corp., 102 A.D.3d 451, 452 (1st Dep't 2013) (settlement agreement was not effective because "the executed release was never forwarded to defendant nor was acceptance of the offer otherwise communicated to defendant or its carrier") (emphasis added) (internal

citations omitted). As the Second Department stated in applying this principle, a "notation by appellant on its books would not be a binding acceptance any more than would be the words of a man speaking to himself." Goldberg v. Colonial Life Ins. Co., 284 A.D. 678, 679-80 (2d Dep't 1954) (holding that even if insurer "duly issued the said life insurance policy on its books," no binding policy was created because insurer never informed decedent that it had accepted his insurance application). See also Moody Eng'g Co. v. Bd. of Educ., 205 A.D. 522, 523-24 (1st Dep't 1923), aff'd, 238 N.Y. 629 (1924) (plaintiff cannot state a claim for breach of contract based on board resolution approving contract because resolution was rescinded before board notified plaintiff of the resolution and "until such notification the board was within its rights in rescinding its resolution"); Church of God v. Fourth Church of Christ, Scientist, 76 A.D.2d 712, 714 (2d Dep't 1980), aff'd, 54 N.Y.2d 742 (1981) ("Although the vote of defendant's membership constituted an acceptance [of offer to purchase church property], such acceptance was not effective until communicated to plaintiff.").

This principle has been applied to precisely the same type of document as the Action Plan – an internal memorandum "setting forth the terms as presented to and approved by the Credit Committee." Philips Credit Corp. v. Regent Health Group, 953 F. Supp. 482, 489-90 (S.D.N.Y. 1997). In Philips Credit, the lender's Credit Committee approved proposed loan terms, but, *unlike* here, that approval

was communicated to the prospective borrower. Id. The proposed terms were then recorded in an internal memorandum which, like here, the borrower subsequently obtained in discovery. Id.

The Philips Credit Court rejected the borrower's argument that the memorandum, along with other documents, created an enforceable obligation. Id. at 513, 518. Noting that the memorandum "was an 'internal PCC [Philips Credit Corp.] memoranda,' sent only to PCC employees," the court held that a "document first obtained by defendants during discovery commenced by the parties after November 12, 1991 . . . is unquestionably irrelevant to this Court's determination of the parties' intent in July 1989." Id. at 512-13. Just like the PCC memo, the Action Plan was an internal document of Brooklyn Federal that was "first obtained by defendant[] during discovery," and just like the PCC memo, the Action Plan is "unquestionably irrelevant" to this action.[13]

2. The Action Plan Is Not an "Agreement" as Required by the Plain Language of the Notes

In rendering the order under appeal here, Justice Ramos placed great weight on the language of this Court's May 28, 2013 decision. Referring to this Court,

[13] As illustrated by Philips Credit, internal committee memoranda such as the Action Plan are a routine part of bank administration and arise from the regulatory requirement that a board committee oversee the bank's loan portfolio. See, e.g., OCC Sample Bylaws for Federally Chartered Banks, available at www.occ.gov/topics/licensing/sample-filing-forms-and-agency-responses.html (last accessed July 30, 2013) (a "loan committee" of the board of directors will, among other tasks, "examine and approve loans and discounts [and] exercise authority regarding loans and discounts"). A finding by this Court that a binding contract can be created by an internal committee memorandum would have enormous implications in the banking industry.

Justice Ramos observed: "They say modified or amended only in writing executed by Brooklyn Federal. They don't say agreement, they don't say how detailed or procedurally how it has to be drafted. It doesn't necessarily have to be authenticated. They just say from their point of view, a writing signed by Brooklyn Federal." (R. 1208.21).

However, by focusing exclusively on the language of the May 28, 2013 decision, which did not address the question here – whether an internal memorandum can be transformed into a binding obligation – Justice Ramos ignored the plain language of the Notes, which provide that "[n]o executory agreement unless in writing and signed by Holder . . . shall be effective to change or modify or discharge, in whole or in part, this Note."[14] (See p. 10, supra). Justice Ramos' focus on the language of the May 28, 2013 decision, from which he concluded that the Notes could be modified by any writing signed by Brooklyn Federal, impermissibly renders the specific clause of the Notes inoperative. "There is no merit to plaintiff's argument that the provision of the indenture barring oral modifications authorizes amendments to be made by any writing signed by the party to be charged, e.g. the side agreements. Plaintiff's reading of that provision

[14] This provision is included in the section of the Notes protecting the Holder from any inadvertent waiver or release of its rights and remedies, and it governs over the more general provisions elsewhere in the Notes and the Building Loan Mortgage (see pp. 10-12, supra). See Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 46 (1956) (specific terms control over general terms).

impermissibly renders nugatory the specific clauses in the indenture governing amendments of the indenture." GLC Securityholder LLC v. Goldman, Sachs & Co., 74 A.D.3d 611, 612 (1st Dep't 2010).

Under New York law, an unambiguous contract "must be enforced as written, and not interpreted in some other way based on one party's assertion that 'when [it] used the words, [it] intended something [other] than the usual meaning.'" Ashwood Capital, Inc. v. OTG Mgmt., Inc., 99 A.D.3d 1, 4 (1st Dep't 2012) (internal citations omitted). The Notes do not define "agreement," so the term must be given its "plain, ordinary, popular and nontechnical meaning." Lopez v. Fernandito's Antique, Ltd., 305 A.D.2d 218, 219 (1st Dep't 2003); R/S Assocs. v. N.Y. Job Dev. Auth., 98 N.Y.2d 29, 32-33 (2002) (same). The dictionary definition of "agreement" is as follows:

> 1. The act of agreeing. 2. Harmony of opinion; accord. 3. An arrangement between parties regarding a course of action; a covenant. 4. *Law* a. A properly executed and legally binding contract. b. The writing or document embodying this contract.

The American-Heritage Dictionary, 4th ed. (2000). The Action Plan is not an "agreement." By its own terms, the Action Plan recommended a course of action to the bank's Workout Committee. The document was not addressed to DAB, nor was it communicated or delivered to DAB, nor does it purport to be a legal document or to memorialize or effect an agreement with DAB. The document was

merely intended, as it states, to internally recommend a plan of action to the Workout Committee, nothing more.

The fact that the Action Plan is not an agreement is evident from the use of the term "agreement" in other Loan Documents. "[I]t is a well-established rule of contract law that all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction." Davimos v. Halle, 60 A.D.3d 576, 577 (1st Dep't 2009) (citation omitted). The two Mortgages and the Building Loan Agreement were all called "agreements" by the parties, and each document was signed by DAB and Brooklyn Federal and sets forth reciprocal rights and obligations. (R. 1578, 898, 862). Moreover, in 2008, DAB and Brooklyn Federal signed a Loan Modification Agreement which, just as DAB seeks here, extended the final maturity date of the Project Loan. (R. 193-98). That document was signed by both parties and the Loans' guarantor before a notary.[15] DAB was thus well aware of the requirements for extending the maturity date of the Notes because this prior conduct by Brooklyn Federal and DAB had manifested the parties' understanding of the plain meaning of "agreement" as "[a]n arrangement between parties" and "[a] properly executed and legally binding contract." The American-Heritage Dictionary, 4th ed. (2000). Moreover, the May 24, 2011 letter

[15] Gallo testified that a Loan Modification Agreement was part of Brooklyn Federal's normal procedures for modifying a final maturity date. (See p. 21, supra).

from DAB's counsel, Wallace, requesting a "written extension of the term of the Loan," demonstrated DAB's awareness that the any written modification of the Loans would be, at the very least, delivered to DAB, not simply maintained in the bank's files. (R. 797). "[T]he parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties.'" Fed. Ins. Co. v. Americas Ins. Co., 258 A.D.2d 39, 44 (1st Dep't 1999) (citation omitted). This prior performance by DAB and Brooklyn Federal conclusively demonstrates that the parties intended that an extension of the maturity date of the Loans be effected precisely as stated by the plain language of the Notes: by a written, signed agreement, not an internal recommendation to the bank's Workout Committee.

3. The Action Plan Does Not Manifest Mutual Assent to Material Terms

Throughout this litigation, DAB has alleged that the Loans were extended for "430 calendar days from August 26, 2010." (R. 422; see also R. 423-24, 833). By contrast, the Action Plan proposed a 180-day extension from March 1, 2011, with a further conditional 180-day extension option to March 1, 2012. The Action Plan also required the payment of extension fees, a requirement DAB has never alleged as part of any purported agreement. The vast difference between the terms repeatedly alleged by DAB and the terms proposed in the Action Plan proves there

was never an enforceable modification of the Loans because there was no meeting of the minds between DAB and Brooklyn Federal as to material terms.

"Fundamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms." Beacon Terminal Corp. v. Chemprene, Inc., 75 A.D.2d 350, 354-55 (2d Dep't 1980) (plaintiff failed to demonstrate "the existence of the requisite intent to effectuate a modification agreement"); see also Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218, 228 (2d Cir. 2001) (a contractual modification "must be established in the same way as is any other contract").

At oral argument on July 9, 2013, Mortgagee attempted to explain the "massive disconnect" between DAB's alleged 430-day extension in August 2010 and the proposed 180-day extension set forth in the Action Plan in February 2011, but the IAS Court demurred: "You are trying to put me in a position of saying, okay, Judge, there is the challenge. Draft the pleading around these facts." (R. 1208.24-1208.25). However, this disconnect is fatal to DAB's counterclaim and cannot be remedied by artful drafting. "Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract. The first step then is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract." Express

Indus. & Terminal Corp. v. New York State DOT, 93 N.Y.2d 584, 589-90 (1999) (internal citations omitted).

Even a cursory review of the Action Plan reveals that it is not the unequivocal acceptance of a definite offer. The maturity date of a promissory note is an essential term. See L.K. Sta. Group, LLC v. Quantek Media, LLC, 62 A.D.3d 487, 491 (1st Dep't 2009) (documents lacked "the essential terms of a loan, such as the interest rate or maturity date, and are thus too uncertain to constitute enforceable agreements"); Willmott v. Giarraputo, 5 N.Y.2d 250, 253 (1959) (option to purchase real estate was unenforceable because parties alleged different maturity dates for mortgage loan). The essential terms alleged by DAB and the terms proposed in the Action Plan cannot be reconciled, thereby precluding the creation of an enforceable agreement. "[B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained." Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109 (1981). The requisite certainty and specificity of terms is absent here, and DAB cannot invoke the power of law to enforce any alleged extension of the Loans.

4. The Action Plan Was Subject to Conditions Precedent that Were Unsatisfied

Finally, the Action Plan is ineffective as an extension of the maturity date of the Loans because it was, by its own terms, subject to conditions precedent that

never occurred. Not only did the Action Plan require DAB to pay an extension fee at the beginning of each new six-month term, but more significantly, no extension could be granted without prior written approval from OTS.

DAB has admitted that it was informed "[i]n the early part of 2011" that "any approval for the extension of the building loan agreement would require OTS approval." (R. 425, 349). DAB does not dispute that OTS never approved an extension of the Loans. As a result, the Action Plan never became a binding contract. See IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y.3d 209, 214 (2009) (no agreement was reached because conditions precedent were unsatisfied); see also Goodstein Constr. Corp. v. New York, 80 N.Y.2d 366, 372 (1992) (Land Disposition Agreement never became effective because "the Board of Estimate was required to approve the LDA in order for it to be a binding contract").

B. DAB'S THIRD COUNTERCLAIM AND NEW AFFIRMATIVE DEFENSES ARE BARRED BY THE LOAN DOCUMENTS AND THE MAY 28, 2013 ORDER OF THIS COURT

DAB's third counterclaim and its five new affirmative defenses are based in tort and equity and do not involve the Action Plan. All of these allegations fail as a matter of law, and the IAS Court should never have permitted them to be asserted.

DAB's fraud counterclaim has already been ruled upon by this Court and is non-actionable. (R. 855). To the extent that DAB's third counterclaim also seeks to assert a breach of the implied covenant of good faith and fair dealing, those

allegations fail as well because the express terms of the Building Loan Mortgage precluded DAB from relying on any alleged oral modification of the Loans. (See pp. 11-12, supra). "While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." Fesseha v. TD Waterhouse Investor Servs., 305 A.D.2d 268, 268 (1st Dep't 2003).

DAB's estoppel defense fails for the same reason as DAB's fraud counterclaim: It is "negated by the express terms of the parties' unambiguous written agreements." CrossLand Sav., FSB v. Loguidice-Chatwal Real Estate Inv. Co., 171 A.D.2d 457, 457 (1st Dep't 1991) (dismissing estoppel defense in mortgage foreclosure action); see also Wasserman v. Harriman, 234 A.D.2d 596, 597 (2d Dep't 1996) (estoppel defense in foreclosure action precluded by "mortgage provision barring oral modifications.").

DAB's waiver defense fails because the Building Loan Mortgage contains a "no waiver" provision (see p. 11, supra), and DAB cannot identify any intentional and knowing renunciation by the mortgagee of its right to foreclose. Antonini v. Petito, 96 A.D.3d 446, 447 (1st Dep't 2012) (waiver defense is meritless "in view of the 'no waiver' provision in the operating agreement").

Finally, DAB's unclean hands, bad faith and unconscionability defenses all fail because, again, the Building Loan Mortgage precluded DAB from relying on

any alleged oral modification of the Loans. Brooklyn Federal's decision not to extend the Loans is not actionable and was, in any case, entirely justified by the bank's discovery that DAB's principal, Zhavian, had deliberately misappropriated Loan funds. "[A] failure to modify or refinance an existing loan does not give rise to an estoppel or constitute bad faith, unclean hands or other conduct upon which a mortgagor defendant may predicate a cognizable defense to a claim for foreclosure and sale." Valley Nat'l Bank v. 58 Vlimp, LLC, No. 25522/2012, 2013 N.Y. Misc. LEXIS 1823, at *13 (Sup. Ct. Suffolk Cnty. April 29, 2013); see also JP Morgan Chase Bank, N.A. v. Ilardo, 36 Misc. 3d 359, 377 (2012) ("To the extent that the Ilardos' unsubstantiated and non-specific allegations of misleading and unconscionable conduct and bad faith over the course of the unsuccessful modification may be construed as sounding in tort, they are legally insufficient."); Delta Props. v. Fobare Enters., 251 A.D.2d 960, 962 (3d Dep't 1998).

CONCLUSION

For the foregoing re asons, the Augus t 28, 2013 Order of the IAS Court should be reversed and summary judgment granted for Mortgagee.

Dated: New York, New York
September 3, 2013

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